BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

OLIN DOVEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 166,196
BOEING COMPANY-WICHITA	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY CO.	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Both the claimant and Workers Compensation Fund requested review of the Award of Administrative Law Judge John D. Clark entered in this proceeding on December 14, 1994. The Appeals Board heard oral argument on March 16, 1995.

APPEARANCES

Claimant appeared by his attorney, Randy S. Stalcup of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Kendall R. Cunningham of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge granted claimant permanent partial disability benefits based upon a twenty-eight and one-half percent (28.5%) work disability. The claimant requested review of that finding. The Workers Compensation Fund requested review of the finding of the Administrative Law Judge that it was liable for the entirety of the Award. Those are the issues now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, claimant is entitled to permanent partial disability benefits based upon a forty-one percent (41%) work disability. The Award against the Workers Compensation Fund is affirmed.

(1) In early August 1991, claimant sought treatment at Boeing Central Medical for complaints in his right elbow. At that time claimant told respondent his symptoms began approximately July 31, 1991. His diagnosis at that time was lateral epicondylitis of the right upper extremity. Later that month claimant returned to Boeing Central Medical with additional complaints and symptomatology. Boeing's company physician, Kenneth D. Zimmerman, M.D., provided treatment and placed restrictions on claimant of limited use of the right arm and no repetitive activities.

Claimant returned to Boeing Central Medical in November 1991 with additional complaints of symptoms in his right arm. Although there was no change in his right elbow from his last visit, claimant had additional symptoms which indicated he was developing carpal tunnel syndrome in that arm. Claimant was diagnosed as having both lateral epicondylitis and early carpal tunnel syndrome on the right. Between November 1991 and March 1992, claimant did not return to Boeing Central Medical. However, in early March 1992, claimant returned to Central Medical for additional treatment to the right upper extremity and was diagnosed as having carpal tunnel syndrome, tendinitis of the wrist, lateral epicondylitis and tendinitis of the shoulder. In April 1992, respondent referred claimant to a specialist, Dr. Morris, for treatment.

Dr. Morris initially took claimant off work. Although the record is not clear when claimant returned to work, he next visited Boeing Central Medical in May 1992 complaining of symptoms indicative of carpal tunnel syndrome in his left arm. At that time claimant provided a history of using his left upper extremity to a greater extent because he was favoring the injured right. Claimant continued working until October 1992 when he was taken off work for surgery to the right knee, which he injured in an unrelated incident that occurred several months earlier. The record is likewise unclear whether

claimant returned to work for respondent after the knee surgery. There is testimony from Boeing's Dr. Zimmerman that claimant's last day of work was December 16, 1992; whereas, there is evidence in Dr. Schlachter's deposition claimant was off work from October 1992 through December 1992, which would indicate claimant did return to work after the knee surgery. In either event, the next major event pertaining to this claim occurred in March 1993 when Dr. Morris surgically released claimant's left carpal tunnel. Dr. Morris later released the right carpal tunnel in June 1993.

Once claimant recuperated from his carpal tunnel surgeries, he attempted to return to work for Boeing but was immediately laid off due to a reduction in force. In March 1994, claimant began work as a salesman at a Wichita car dealership.

The testimony of three physicians was presented for consideration of the nature and extent of claimant's impairment. Boeing's Dr. Kenneth Zimmerman testified claimant now has a fifteen percent (15%) impairment to his right upper extremity and fifteen percent (15%) impairment to his left upper extremity, utilizing the AMA Guides, Third Edition, Revised. Dr. Zimmerman indicated claimant may lift up to thirty (30) pounds but should limit right wrist motion, grasping and grabbing on the right, to no more than three (3) hours per day. Additionally, claimant should not operate power tools. The respondent also introduced the testimony of Wichita physician Ernest R. Schlachter, M.D. Dr. Schlachter diagnosed bilateral carpal tunnel syndrome, previously operated, and agreed with Boeing's Dr. Zimmerman that claimant had sustained a fifteen percent (15%) impairment to each upper extremity, which converts to a seventeen percent (17%) impairment of function to the body as a whole. Dr. Schlachter believes claimant should observe the restrictions of no repetitive pushing, pulling, twisting or grasping with either hand; limit lifting to no greater than ten (10) pounds on a repetitive basis or fifteen (15) pounds for a single lift; and avoid vibratory tools and cold environments.

The claimant presented the testimony of Daniel D. Zimmerman, M.D., of Kansas City, Kansas. Claimant's Dr. Zimmerman believes claimant has experienced a thirty percent (30%) impairment of function to the body as whole as a result of the bilateral upper extremity injury and believes claimant should observe the restrictions of no lifting greater than twenty (20) pounds on more than an occasional basis and no more than ten (10) pounds on a frequent basis; and avoid frequent flexing, extending, twisting, torquing and hammering with the hands. Although Dr. Morris was not deposed, his restrictions were utilized by both labor market experts hired by the parties. A review of the transcripts of the labor market experts indicates Dr. Morris believes claimant should refrain from repetitive activities and using vibratory tools.

The parties presented two labor market experts who testified regarding claimant's loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage. Claimant's Jerry Hardin testified claimant had a loss of ability to perform work in the open labor market of thirty-five to forty percent (35-40%) utilizing the restrictions of Dr. Morris and a fifty-five to sixty percent (55-60%) loss utilizing the restrictions of Dr. Daniel Zimmerman and disregarding any pre-injury restrictions. However, if pre-injury restrictions were considered, Mr. Hardin believes claimant has experienced a thirty-five to forty percent (35-40%) loss of ability to perform work in the

open labor market, regardless of whether he utilized the restrictions of Dr. Morris or Dr. Daniel Zimmerman. Respondent's Karen Terrill testified she believes claimant has lost thirty-four percent (34%) of his ability to perform work in the open labor market, utilizing pre-injury restrictions provided by Dr. Schlachter and the post-injury restrictions of Dr. Kenneth D. Zimmerman and Dr. Morris.

At this point we should note the claimant sustained a rather severe injury while working for Boeing in 1990, when he injured his neck, low back, left knee and right arm. As a result of that injury, claimant currently receives workers compensation benefits based upon a running award for a twenty-five percent (25%) functional impairment to the body. After the 1990 accident, Dr. Schlachter evaluated claimant and placed restrictions on him of no lifting greater than twenty (20) pounds; no working above horizontal or performing work that required him to look overhead; no stair climbing; no kneeling or squatting; limited walking; intermittent sitting and standing; and no repetitive bending, twisting, or working in awkward positions. When claimant returned to work after the 1990 accident, Boeing modified his job duties and gave him bench work. These are the pre-injury restrictions the respondent argues should be utilized when considering work disability.

Returning to the bilateral carpal tunnel injury, the Appeals Board finds the date of accident is December 16, 1992, because that is the day that appears in the Boeing Central Medical records as claimant's last day of work before his carpal tunnel surgeries by Dr. Morris. Due to this finding, K.S.A. 1992 Supp. 44-510e is the appropriate statute that defines claimant's right to permanent partial general disability benefits. The statute provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

Giving greater weight to Karen Terrill's opinions, the Administrative Law Judge found claimant had lost thirty-four percent (34%) of his ability to perform work in the open labor market. Based upon the facts of this case, the Appeals Board finds such finding is reasonable and within the range of loss that has been proven. The Appeals Board adopts that finding as its own.

Regarding loss of ability to earn a comparable wage, the Appeals Board finds claimant has lost approximately forty-seven percent (47%) of that ability. As determined by the Administrative Law Judge, claimant's average weekly wage was $791.05. Based upon claimant's testimony and that of the labor market experts, the Appeals Board finds claimant is now capable of earning between $1600 and $2000 per month, or an average of $416 per week. Comparing $416 per week to the average weekly wage of $791.05 per week, claimant has a wage loss of approximately forty-seven percent (47%), which we find to be a reasonable measure of his loss of ability to earn a comparable wage.

Although the Appeals Board is not required to equally weigh loss of access to the open labor market and loss of ability to earn a comparable wage, there is no compelling reason in this case to give either factor greater weight. Therefore, the Appeals Board averages both losses and finds claimant has a sustained a forty-one percent (41%) permanent partial general disability in accordance with K.S.A. 1992 Supp. 44-510e. See Hughes v. Inland Container Corp., 247 Kan. 407, 422, 799 P.2d 1011 (1990) and Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 52-53, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

(2) The Workers Compensation Fund is responsible for the entirety of this Award. This finding of the Administrative Law Judge is affirmed.

Both Dr. Kenneth Zimmerman and Dr. Ernest Schlachter testified that claimant developed right carpal tunnel syndrome as a direct result of the lateral epicondylitis that developed in claimant's right elbow. Both doctors also agree claimant then developed carpal tunnel syndrome in his left upper extremity as a result of favoring his right hand and arm. These opinions are buttressed by the medical records compiled by Boeing Central Medical over several years of treatment. As early as November 1991, and perhaps as early as August 1991, Boeing suspected claimant was developing carpal tunnel syndrome in his right extremity because of his increasing symptomatology. Despite that knowledge, Boeing retained claimant in its employment and attempted to protect his health by giving him work restrictions.

The Workers Compensation Fund argues claimant had developed carpal tunnel syndrome as early as May or June 1991 and relies on claimant's memory of his history of injury and symptomatology. However, the Appeals Board finds the medical notes compiled and recorded by respondent over the years more truly reflect the history of injury as claimant's memory may be clouded with time.

K.S.A. 1992 Supp. 44-567 addresses the issue of apportionment of liability between the respondent and the Kansas Workers Compensation Fund. K.S.A. 1992 Supp. 44-567(a) provides:

> "An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the cost thereof as follows:
> "(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund."

K.S.A. 44-566(b) defines a handicapped employee as:

> " . . . one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:
>
> . . . .
>
> "17. Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

The Appeals Board finds the respondent retained claimant in its employ after August 1991 with knowledge of claimant's right lateral epicondylitis which was severe enough for additional work restrictions and limitations to be issued. Based upon the testimony of Dr. Kenneth Zimmerman and Dr. Ernest Schlachter, it is more probably true than not that the lateral epicondylitis caused claimant to alter the manner in which he used his upper extremities to perform his work and, thus, caused the onset of the right carpal tunnel syndrome, which, in turn, caused the development of carpal tunnel syndrome on the left.

Based upon the evidence presented, the Appeals Board finds claimant would not have developed carpal tunnel syndrome on the right but for the lateral epicondylitis, and would not have developed carpal tunnel syndrome on the left but for the development of the carpal tunnel syndrome on the right. Therefore, K.S.A. 1992 Supp. 44-567(a)(1) requires that all workers compensation benefits payable because of this injury and disability be assessed against the Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark entered in this proceeding on December 14, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Olin Dovel, and against the respondent, Boeing Company-Wichita, and its insurance carrier, Aetna Casualty & Surety, for an accidental injury which occurred December 16,1992, and based upon an average weekly wage of $791.05, for 31 weeks of temporary total disability compensation at the rate of $278 per week or $8,618, followed by 384 weeks at the rate of $216.23 per week or $83,032.32 for a 41% permanent partial general body disability making a total award of $91,650.32.

As of June 2, 1995, there is due and owing claimant 31 weeks of temporary total disability compensation at the rate of $278 per week or $8,618, followed by 97.29 weeks of permanent partial disability compensation at the rate of $216.23 per week in the sum

of $21,037.02, for a total of $29,655.02 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $61,995.30 is to be paid for 286.71 weeks at the rate of $216.23 per week, until fully paid or further order of the Director.

The Workers Compensation Fund is responsible for the entirety of this Award.

The orders of the Administrative Law Judge set forth in the Award of December 14, 1994 are hereby adopted by the Appeals Board to the extent they are not inconsistent with the orders and Award specifically entered herein.

IT IS SO ORDERED.

Dated this ____ day of May 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Wichita, KS
Frederick L. Haag, Wichita, KS
Kendall R. Cunningham, Wichita, KS
John D. Clark, Administrative Law Judge
George Gomez, Director